Supreme Court, U. S.
FEB 23 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petition for Certiorari Filed November 13, 1976
Certiorari Granted January 10, 1977

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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RELEVANT DOCKET ENTRIES

September 26, 1975 Complaint, filed.

September 26, 1975 Order to Show Cause, filed.

October 7, 1975 Answer of Defendant Third National Bank in Nashville, filed.

October 14, 1975 Affidavit of Paul J. Brown, filed.

October 14, 1975 Affidavit of Charles W. Cook, Jr., filed.

October 14, 1975 Affidavit of John A. Thweatt, filed.

October 14, 1975 Order, filed.

October 16, 1975 Supplemental Answer of Third National Bank in Nashville, filed.

October 16, 1975 Motion of Third National Bank in Nashville, filed.

November 6, 1975 Answer of First and Mid-South Mortgage Company, filed.

December 9, 1975 Memorandum, filed

January 8, 1976 Order, filed.

August 16, 1976 Opinion of the Supreme Court of Tennessee, filed.

August 16, 1976 Dissenting Opinion of Justice Brock, filed.

August 16, 1976 Order, filed.

IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE

No. A-6089

IMPAC LIMITED, INC.,
F. MURRAY PARKER and
JAMES K. WALL,
Plaintiffs,

vs.

THIRD NATIONAL BANK

and

FIRST AND MID-SOUTH
MORTGAGE COMPANY,
Defendants.

COMPLAINT

(Filed September 26, 1975)

Come the Plaintiffs, Impac Limited, Inc., F. Murray Parker and James K. Wall, and would respectfully show unto the court as follows:

1. That Plaintiffs, James K. Wall and F. Murray Parker, are owners of the property known as the Brentwood Plaza Office Building in Davidson County, Tennessee, said property being specifically described as follows:

> Being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County, described as follows:
>
> BEGINNING at the southeast corner of Wilson and Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly

> margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

2. That Plaintiffs sought to construct the office building, consisting of approximately Thirty Thousand (30,000) square feet in the early part of 1973. That, to proceed with construction, Plaintiffs needed both construction and permanent financing for said building. That at that time Plaintiffs were incorporated under the name of Impac Limited, Inc., with said Plaintiffs being sole stockholders. That since that time the property was transferred out of the corporation to Plaintiffs Wall and Parker, with Gail Pigg holding title in trust for and on behalf of said Plaintiffs.

3. That Plaintiffs asked for said financing from Defendant, First & Mid-South Mortgage Company, who in turn sought the construction financing from Third National Bank. Third agreed to finance the construction to a maximum amount of Seven Hundred Thousand and No/100 ($700,000.00) Dollars, provided it had the assurance of First & Mid-South that it would be "taken out" at completion of construction. This assurance would provide security for the funds extended by Third National Bank.

4. That First and Mid-South agreed with Plaintiffs and Defendant, Third National Bank, on January 10, 1973, that it would make the permanent loan with the assurance that it would take Third out at the completion of construction. A copy of said commitment is attached hereto and

marked Exhibit "A" to this complaint, but same need not be copied for process.

5. In reliance on the aforesaid assurance of First and Mid-South that it would "take out" Third, Third then agreed to make the construction loan.

6. That prior to closing, it was determined by defendants that the permanent loan would be pre-closed as a "permanent-construction" loan, i.e., that at completion of construction the construction loan would be converted into a permanent loan and Third would simply sell or assign its loan documents to First and Mid-South. Therefore, the title insurance named both Third and First and Mid-South as beneficiaries, a copy of which is attached hereto and marked Exhibit "B" to this complaint, but same need not be copied for process.

That at the time the construction loan note and deed of trust were executed by Plaintiffs, an agreement was also executed by Plaintiffs, by Third and by First and Mid-South whereby First and Mid-South agreed to purchase said note and deed of trust at completion of construction subject only to compliance with the terms and conditions of the commitment. The agreement also prohibited Plaintiffs from obtaining another first mortgage from any other lender. In other words, the permanent loan was already made, but would become effective under monthly payments, etc. at completion of construction. A copy of said agreement is attached hereto and marked Exhibit "C" to this complaint, but same need not be copied for process.

7. That extensions for completion of construction were subsequently granted to the original commitment term by both Third and First and Mid-South and First and Mid-South agreed to fund Eight Hundred Thousand

and No/100 ($800,000.00) Dollars rather than the initial Seven Hundred Thousand and No/100 ($700,000.00) Dollars. A copy of said commitment is attached hereto and marked Exhibit "D" to this complaint, but same need not be copied for process. That Plaintiffs have paid a total of Forty Thousand and No/100 ($40,000.00) Dollars for the "privilege" of having these commitments and extensions. Twenty-One Thousand and No/100 ($21,000.00) Dollars was paid to Third National Bank and Nineteen Thousand and No/100 ($19,000.00) Dollars was paid to First and Mid-South Mortgage, no portion of which has ever been returned. In addition, of course, interest has been paid up until August 1, at which time the permanent loan was to become effective.

8. That the last commitment date expired July 31, 1975. That as the time drew nearer to said expiration date, First and Mid-South, in a time of tight mortgage economy, was having difficulty obtaining another investor and would itself have to honor its own commitment. It became more and more apparent to Plaintiffs in May and June that First and Mid-South was continuously bringing up new complaints and new requirements, many of them trite and of no consequence, as set forth in the letter of May 12, 1975, which is attached hereto and marked Exhibit "E" to this complaint, but same need not be copied for process.

That approximately thirty (30) days before commitment expiration, Defendant, First and Mid-South made the totally new demand as a condition of their going forward with their obligation to take out Third from the construction loan that Plaintiffs obtain the lot adjacent to the existing building for additional parking space and obtain a survey showing the adjoining lot and additional parking space. A copy of the letter requiring same is

attached hereto and marked Exhibit "F" to this complaint, but same need not be copied for process. Plaintiffs proceeded to attempt to satisfy said requirement, to the extent that, with the permission of the owner of the property, they had pulled down the trees on said lot, and had graded and filled. However, they were placed in the absolutely impossible position of obtaining a survey to show said adjacent lot as having no encumbrances or encroachments when there was a building on said lot to be torn down. This could only be done after Plaintiffs exercised their option to purchase, which they were financially unable to do until the final closing of the permanent loan. That both Defendants were fully aware of the impossibility of this task.

That Plaintiffs were placed in the extremely frustrating position of attempting to meet new demands that were impossible to meet, and facing new ones every few days. That it finally became apparent to Plaintiffs that First and Mid-South was deliberately placing them in a position of making their performance impossible.

That although First and Mid-South knew of the expiration date, and the building had been substantially complete, lacking only tenant finish work, for more than a year, it did not make any of the above demands until after both Plaintiffs and Third had made demand for funding in May and June of 1975.

9. That all requirements of the original commitment which had not been waived by First and Mid-South were substantially completed on July 31, 1975, and would have been fully completed but for the new demands and hindrances of First and Mid-South.

10. That the loan currently outstanding to Third is Seven Hundred Thousand and No/100 ($700,000.00) Dollars. That the value of the building is approximately One Million One Hundred Thousand and No/100 ($1,100,000.00) Dollars.

11. That Third, unless restrained from so doing by this Honorable Court, will foreclose said property on November 7, 1975, at 12:00, as advertised in the Nashville Record, a copy of said advertisement being attached hereto and marked Exhibit "G" to this complaint, but same need not be copied for process.

12. That Plaintiffs are not in default on their loan either to Third or to First and Mid-South. That pursuant to the agreement (Exhibit "C"), the construction and permanent loan were consolidated, and First and Mid-South was to take out Third by buying the note and deed of trust executed by Plaintiff, Impac, in May, 1973. That First and Mid-South has wholly and totally failed to honor its commitment to Third and Third, rather than pursuing its remedy against First and Mid-South under its contract, is simply seeking to foreclose the loan and thereby wipe out Plaintiffs' equity of approximately Four Hundred Thousand and No/100 ($400,000.00) Dollars.

13. That the permanent loan was closed, that the remedy of Third is against First and Mid-South rather than Plaintiffs. That they cannot, in equity, fail to pursue that remedy to Plaintiffs' detriment. That Plaintiffs are caught between, and at the mercy of, the Defendant banks. That Plaintiffs relied on the aforesaid agreement of all parties, to the extent even that Plaintiffs were prohibited from seeking other financing under said agreement.

Premises considered, Plaintiffs pray:

1. That proper process issue and be served upon Defendants requiring them to answer within the time prescribed by law but their oaths to their answers are waived.

2. That Defendant, Third National Bank, be restrained from foreclosing the subject property pending further orders of this Court.

3. That the court find that Defendant, First and Mid-South Mortgage Company, has breached its agreement to take Third National Bank out of the construction loan as above set forth, to the detriment of Plaintiffs, and that First and Mid-South be required to specifically perform its agreement of May 18, 1973, to purchase said note and deed of trust from Third National Bank.

4. That the court find the Defendant, First and Mid-South liable for all damages accruing to Plaintiffs as a result of the aforesaid breach, and enter a judgment accordingly.

5. For such other and further relief to which Plaintiffs are justly entitled.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY PROCESS IN THIS CAUSE.

/s/ Gail Pigg

I am surety for the costs of this cause not to exceed $250.00.

/s/ Gail Pigg

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

JAMES K. WALL being first duly sworn makes oath that he has read the foregoing complaint, knows the contents thereof and that the same is true to the best of his knowledge, information and belief, that this complaint

is not made out of levity or collusion with Defendants, but in truth and sincerity for the cause mentioned herein.

/s/ James K. Wall

Sworn to and subscribed before me this 25th day of September, 1975.

/s/ Gail Pigg

(Seal)

My Commission Expires: 4/27/77.

Exhibit "A"

FIRST AND MID-SOUTH MORTGAGE COMPANY
P. O. Box 2568
Nashville, Tennessee
615/254-5401

January 30, 1973

Mr. F. Murray Parker
Mr. James K. Wall
Church Street
Brentwood, Tennessee

Re: First Mortgage Loan—$700,000
Brentwood Plaza Office Building
Wilson Pike Circle, Brentwood, Tennessee

Gentlemen:

First and Mid-South Mortgage Company agrees to make a first mortgage loan on the above captioned property in the amount of $700,000 at an interest rate of 9% per annum for a term of 25 years with equal monthly installments to principal and interest.

The loan amount of $700,000 is subject to and contingent upon the leasing of at least 21,800 sq. ft. of the proposed building. This space must be rented for terms

of at least 5 years and at rates of not less than $5.50 per square foot per year that will produce $120,300 annual rental income, evidenced by copies of valid lease agreements satisfactory to this company. In the event this leasing requirement is not attained prior to expiration of this commitment the loan will be closed at the reduced amount of $575,000.

This commitment is issued subject to the following conditions:

1. The loan is to be secured by a valid first lien on the fee simple title to property located in Davidson County, Tennessee, being Lots 8, 9 & 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County. The property fronts 300 feet on Wilson Pike and runs back between parallel lines 180 feet each to a line in the rear measuring 300 feet.

2. All legal fees and other expenses in connection with the closing of this loan are to be paid by the mortgagor.

3. Prior to closing, this company must be supplied with a survey showing no encroachments other than those approved by us and showing the building to be within lot and building lines.

4. We are to be furnished with a mortgagee's title insurance policy issued by a company approved by us.

5. Mortgagor is to furnish satisfactory proof of compliance with any and all applicable laws, regulations and zoning requirements.

6. Fire and extended coverage insurance policies are to be furnished in an amount not less than the full insurable value of the improvements, issued by companies satisfactory to us.

7. Applicant agrees to furnish, if applicant is a corporation or partnership, all appropriate papers, attorney's opinions and legal documents evidencing applicant's capacity, legal authority, good standing and the qualifications of signers to execute the loan instruments and to engage in any transaction or business in connection with which the loan is made.

8. We will require a general assignment of the rent to First and Mid-South Mortgage Company in case of default on the monthly payments.

9. The loan documents shall contain the following items or provisions:

(a) Installments shall be due and payable on the first day of each month.

(b) The holder may collect a "late charge" not to exceed an amount equal to 4% on any installment which is not paid within 15 days of the due date thereof, to cover the extra expense involved in the handling of delinquent payments, provided that collection of said late charges shall not be deemed a waiver by the holder of any of its other rights under the note.

(c) The mortgagee is to be furnished with a certified, itemized statement of annual income and expenses on the property covered by this loan, within 90 days following the end of each fiscal or calendar year.

(d) Proper covenant requiring monthly escrow deposits for payment of real property taxes and hazard insurance premiums.

10. Prior to closing the loan, the improvement must be built and completed in accordance with the plans and specifications which are to be submitted to us for approval.

11. This commitment shall expire April 30, 1973.

12. Upon acceptance of this commitment, you are to forward a check in the amount of $7,000 as a non-refundable commitment fee to First and Mid-South Mortgage Company.

13. We jointly agree that the issuance of this commitment is to expedite the beginning of construction and to assure a permanent take-out from the construction lender. Therefore, in the event interest rates increase or decrease to the extent that 9% is not competitive, then the borrowers will agree to cooperate with First and Mid-South Mortgage Company by agreeing to an increase of up to 1/4 percent if the permanent lender represented by First and Mid-South Mortgage Company has not committed by April 30, 1975. We also agree to arrange the loan at the lowest rate possible down to 8-1/2% and the competitive rate today is around 8-3/4 percent for long-term money and the First National City Bank of New York is quoting a prime bank rate of 6-1/4%. The debt service on 9% - 25 years is $5,880 per month and on 9-1/4% - 25 years is $5,997 per month.

We appreciate your offering us the opportunity to make this loan and trust that it will be handled to your entire satisfaction. Please accept and return to our office, with the proper deposit, no later than February 8, 1973.

Very truly yours,

/s/ John A. Thweatt
John A. Thweatt
Vice President

/s/ Willie K. Davis
Willie K. Davis
Executive Vice President

JAT:jy

Accepted this ..... day of February, 1973.

By: .....

Exhibit "B"

SCHEDULE A

Your No.
Commitment No. 231375

Inquiries should be directed to Suzanne Johnston

1. Effective date: April 25, 1973

2. Policy or Policies to be issued: Amount

   (a) ☐ ALTA Owners Policy—
   Form ..... —1970 $.....
   Proposed Insured:

   (b) [x] ALTA Loan Policy 1970 $700,000.00
   Proposed Insured: Third National Bank and First & Mid-South Mortgage as their interest may appear

3. The estate or interest in the land described or referred to in this Commitment and covered herein is a Fee Simple.

4. Title to said estate or interest in said land is at the effective date hereof vested in:

   IMPAC LTD., INC.

5. The land referred to in this Commitment is located in the County of Davidson

   State of Tennessee and described as follows:

Being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County, described as follows:

BEGINNING at the southeast corner of Wilson and Harpeth Pike and Frierson Street, formerly Elm Street; thence

running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.
Being the same property conveyed to Impac Ltd., Inc., by deed from Bob L. Robinson, Trustee, of record in Book 4655, page 818, said Register's Office.

I. The following are the requirements to be complied with:

1. Instruments necessary to create the estate or interest to be insured must be properly executed, delivered and duly filed for record.

By deed in Book 4478, page 782, said property was conveyed to Bob L. Robinson, Trustee, predecessor in title of the above-mentioned owner. We will require proof as to the persons for whom said Robinson was acting as trustee and as to the terms and conditions of his trust with respect to the sale and conveyance of the said property.

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.

2. Standard Exceptions:

(a) Rights or claims of parties in possession not shown by the public records.

(b) Easements, or claims of easements, not shown by the public records.

(c) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises.

(d) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

3. Special Exceptions:

(a) Taxes
1973, a lien, but not yet due and payable.
Parcels 6D-60750, 60760 and 60770

(b) Vendor's lien retained in the deed from Robert W. Sturdivant Trustee, to Ronald S. Ligon, et al, of record in Book 4287, page 665, to secure a note dated Nov. 8, 1968, for $27,500.00, payable in 5 annual installments of $5,500.00 each, plus interest at 6% per annum.

Exhibit "C"

Agreement made as of the 18th day of May, 1973 between and among Third National Bank in Nashville, a bank, having its principal place of business at Nashville, Tennessee (the "Temporary Lender"); Impac Limited, Inc. residing at (or having its principal office at) Brentwood,

Tennessee (the "Borrower"), and First and Mid-South Mortgage Company, having its principal place of business in Nashville, Tennessee (the "Permanent Lender"),

WITNESSETH:

Whereas,

1. Heretofore and by agreement in writing dated May 18, 1973 (the "Commitment") made between the Permanent Lender and the Borrower, the Permanent Lender, subject to the terms and conditions set forth in said Commitment, agreed to make a loan to the Borrower in the sum of $700,000.00, or in lesser sums as specified in said Commitment if certain of the requirements were not met, to be secured by a first mortgage or deed of trust upon the fee simple title to certain real property and the improvements thereon existing and/or to be built, described as follows:

Land in Davidson County, Tennessee, being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County described as follows:

Beginning at the southeast corner of Wilson or Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

and

2. The Commitment anticipates that the Borrower will require interim or construction financing and that an agreement is to be executed in form and substance satisfactory to the Borrower, Temporary Lender and Permanent Lender, pursuant to which such interim Lender (Temporary Lender) shall agree to sell, assign and transfer to the Permanent Lender (but subject nevertheless to compliance with all of the terms, provisions, covenants and conditions of the Commitment hereinabove referred to) any building loan note and mortgage (or deed of trust) executed and delivered by the Borrower to such interim lender; and

3. The Temporary Lender and the Borrower have entered into one or more agreements to provide the Borrower with certain funds to be used in connection with the construction of improvements upon the land described in the Commitment, and pursuant to such Building Loan Agreement (or however said agreements are styled) the Borrower has executed and delivered a note or notes (collectively, the "Building Loan Note") in the sum of $700,000.00, bearing interest at the rate of 8½% per annum, said Building Loan Note being secured by a deed of trust or mortgage (the "Building Loan Mortgage") upon the aforesaid real property. Interest rate is subject to increase as therein set out.

Now, therefore, in consideration of the reciprocal undertakings of the parties and for other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

FIRST: PURCHASE AND SALE. The Temporary Lender agrees to sell to the Permanent Lender and, subject to compliance with all of the terms and conditions of the Commitment and of this Agreement, the Permanent Lender agrees to purchase from the Temporary Lender

the Building Loan Note and the Building Loan Mortgage. The Permanent Lender agrees to pay the Temporary Lender for the Building Loan Note and the Building Loan Mortgage the aggregate unpaid balance of the Temporary Lender's principal advances under the Building Loan Agreement at the time of purchase of said note, in no event, however, to exceed the sum of $700,000.00, or if certain of the requirements of said Commitment shall not have been fulfilled, then in such lesser amounts as therein specified; and the Temporary Lender will assign the Building Loan Note and the Building Loan Mortgage to the Permanent Lender by an assignment in form and substance satisfactory to the Permanent Lender. While such assignment may be made without warranty by or recourse to the Temporary Lender, it is agreed that same is to be accompanied by a binding representation by the Temporary Lender, upon which Permanent Lender will rely, and the estoppel statement of the Borrower as to the unpaid indebtedness and interest thereon (including accrual date), and Borrower shall further agree at such time that there are no defenses or offsets to the payment of said indebtedness and interest.

SECOND: CLOSING. The closing of the purchase and sale of the Building Loan Note and the Building Loan Mortgage shall take place at the office of the Temporary Lender or at such other place as the Temporary Lender and the Permanent Lender may agree.

THIRD: MODIFICATION AND EXTENSION AGREEMENT. At time of the closing of the permanent loan the Borrower shall execute and deliver such modification and extension of the Building Loan Note and the Building Loan Mortgage (which modification and extension may be accomplished by the execution and delivery of a new note and mortgage (or deed of trust) by the Borrower) as may be required to conform the terms thereof to the terms of the Commitment, and such other documents as are provided to be executed and delivered by the Borrower in accordance with the provisions of the Commitment, all in form and substance satisfactory to the Permanent Lender, and shall otherwise perform and observe all of the requirements of the Commitment on the part of the Borrower to be performed and observed.

FOURTH: RESTRICTION ON SALE OF BUILDING LOAN NOTE AND BUILDING LOAN MORTGAGE. Prior to the expiration of the commitment or any extension thereof, the Temporary Lender agrees (1) not to release any part of the security for its loan; (2) not to accept prepayment (except to the extent required to reduce the unpaid balance of the Building Loan Note to an amount equal to the agreed purchase price; (3) not to accelerate the maturity of the indebtedness; and (4) not to assign or transfer said loan (except to the Permanent Lender pursuant to the commitment). In the event of default by Borrower, however, Temporary Lender may do any one or more of said above numbered acts but not sooner than twenty days after the Permanent Lender has received notice advising of such default. If within said twenty-day period the Permanent Lender agrees in writing with the Temporary Lender to purchase the loan notwithstanding such default, then the Temporary Lender's agreement not to release, accept prepayment, accelerate or assign, as above, shall, simultaneously with the execution of such written agreement, be reinstated. The provisions hereof are subject to any requirement of law that the disposition of the assets of the Temporary Lender shall at all times be and remain within its control. The Borrower hereby confirms and consents to all of the above and promises that Borrower will not accept a first mortgage loan upon

the aforesaid real property from any other lender before the termination of the Commitment by the Permanent Lender.

FIFTH: TERMINATION. The parties hereto agree that although the Commitment bears a date of termination, such termination is actually only at the option of the Permanent Lender herein, and Permanent Lender reserves the right unilaterally to extend the commitment date at any time within thirty days following such stated termination. The Borrower and Temporary Lender agree that said Commitment shall remain in full force and effect for all the purposes of this agreement until thirty days following said termination date or such later date as Permanent Lender shall indicate in writing (in the manner provided for notices in this agreement) during said thirty-day period.

SIXTH: NOTICES. All notices, demands and requests hereunder shall be in writing and shall be deemed to have been properly given if sent by United States registered mail, postage prepaid, addressed to the parties at the respective addresses set forth at the beginning of this agreement, or at such other address as any of the parties may from time to time designate by written notice given as herein required. Notices, demands and requests given in the manner aforesaid shall be deemed sufficiently served or given for all purposes hereunder two days following the time such notice, demand or request shall have been deposited in any Post Office or Branch Post Office regularly maintained by the United States government.

SEVENTH: DEFINITIONS. As used herein, the term "note" shall mean a note or a bond, and the term "mortgage" shall mean a mortgage or a deed of trust, as the Permanent Lender shall require.

EIGHTH: NO ORAL MODIFICATION. This agreement may not be changed, terminated or modified orally or in any manner other than by an agreement in writing signed by the parties hereto.

NINTH: BINDING EFFECT. The covenants, agreements, rights and options contained in this agreement shall be binding upon and shall inure to the benefit of the respective heirs, executors, successors and assigns of the parties hereto and all persons claiming by, through or under any of them.

TENTH: CONSTRUCTION OF AGREEMENT. This agreement shall be construed in accordance with the laws of the state where the above real estate is located.

This agreement shall bind and inure to the benefit of the successors and assigns of the parties hereto.

Third National Bank in Nashville
By: /s/ York Lillie, Jr. c/a

Impac Limited, Inc.
By: /s/ James K. Wall
/s/ F. Murray Parker

First and Mid-South Mortgage Co.
By: /s/ Willie K. Davis, Ex. V.P.

Exhibit "D"

FIRST AND MID-SOUTH MORTGAGE COMPANY
P. O. Box 2568
Nashville, Tennessee
615/254-5401

May 30, 1974

Mr. F. Murray Parker
Mr. James K. Wall
Peach Court
Brentwood, Tennessee 37027

Re: First Mortgage Loan—$800,000
Impac Limited, Inc., Mortgagor
Wilson Pike Circle, Davidson County
Brentwood, Tennessee
Brentwood Plaza Office Building

Gentlemen:

First and Mid-South Mortgage Company agrees to make a first mortgage loan on the above captioned property in the amount of $800,000 for a minimum term of 25 years. The interest rate will be the competitive market rate at the time the borrowers desire to use this commitment to take out the construction lender. The competitive rate today for a loan on this type property is 9-3/8% to 9-1/2%.

The loan amount of $800,000 is subject to and contingent upon the leasing of at least 22,544 sq. ft. of the proposed building. This space must be rented for terms of at least 3 years and at rates of not less than $6.25 per square foot per year which will produce $140,900 annual rental income, evidenced by copies of valid lease agreements satisfactory to this company. In the event

this leasing requirement is not attained prior to the expiration of this commitment, the loan will be closed at the reduced amount of $656,000.

This commitment is issued subject to the following conditions:

1. The loan is to be secured by a valid first lien on the fee simple title to property located in Davidson County, Tennessee, being Lots 8, 9, & 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County. The property fronts 300 feet on Wilson Pike and runs back between parallel lines 180 feet each to a line in the rear measuring 300 feet. The deed to Impac, Limited, Inc., is recorded in Book 4655, page 818, Register's Office, Davidson County, Tennessee.

2. All legal fees and other expenses in connection with the closing of this loan are to be paid by the mortgagor.

3. Prior to closing, this company must be supplied with a survey showing no encroachments other than those approved by us and showing the building to be within lot and building lines.

4. We are to be furnished with a mortgagee's title insurance policy issued by a company approved by us.

5. Mortgagor is to furnish satisfactory proof of compliance with any and all applicable laws, regulations and zoning requirements.

6. Fire and extended coverage insurance policies are to be furnished in an amount not less than the full insurable value of the improvements, issued by companies satisfactory to us.

7. Applicant agrees to furnish, if applicant is a corporation or partnership, all appropriate papers, attorney's opinions and legal documents evidencing applicant's capacity, legal authority, good standing and the qualifications of signers to execute the loan instruments and to engage in any transaction or business in connection with which the loan is made.

8. We will require a general assignment of the rent to First and Mid-South Mortgage Company in case of default on the monthly payments.

9. The loan documents shall contain the following items or provisions:

(a) Installments shall be due and payable on the first day of each month.

(b) The holder may collect a "late charge" not to exceed an amount equal to 4% on any installment which is not paid within 15 days of the due date thereof, to cover the extra expense involved in the handling of delinquent payments, provided that collection of said late charges shall not be deemed a waiver by the holder of any of its other rights under the note.

(c) The mortgagee is to be furnished with a certified, itemized statement of annual income and expenses on the property covered by this loan, within 90 days following the end of each fiscal or calendar year.

(d) Proper covenant requiring monthly escrow deposits for payment of real property taxes and hazard insurance premiums.

10. Prior to closing the loan, the improvement must be built and completed in accordance with the plans and specifications which are to be submitted to us for approval.

11. This commitment shall expire July 31, 1975, 60 days notice to fund.

12. Upon acceptance of this commitment, you are to forward a check in the amount of $12,000 as a non-refundable commitment fee to First and Mid-South Mortgage Company. However, if First and Mid-South's obligation under this commitment is removed within 1 year from the date of this letter, then First and Mid-South will refund $4,000 to the borrower.

We appreciate your offering us the opportunity to make this loan and trust that it will be handled to your entire satisfaction. Please accept and return to our office, with the proper deposit, no later than May 31, 1974.

Very truly yours,

/s/ John A. Thweatt
John A. Thweatt
Vice President

/s/ Willie K. Davis
Willie K. Davis
President

JAT:jy

Accepted this 31st day of May, 1974.

Impac Limited, Inc.

By: /s/ F. Murray Parker

Exhibit "E"

FIRST AND MID-SOUTH MORTGAGE COMPANY
Established 1935
P. O. Box 2568
Nashville, Tennessee
615/254-5401

May 12, 1975

Mssrs. F. Murray Parker
and James K. Wall
Parker Builders
Brentwood, Tennessee 37027

Re: Brentwood Plaza
Brentwood, Tennessee

Gentlemen:

On May 9th, we carried a representative of Northwestern Mutual Life Insurance Company by the subject property. He had expressed an interest in this loan and this was the purpose for his trip to Nashville. Upon our inspection of the property, several matters were brought to my attention and I think it is to your benefit that I pass them on to you.

First, even though the building is very attractive, it gives an unfinished appearance. The areas between the parking lot and streets and the area in back of the building have not been cleaned up and landscaped. The concrete in the entrance needs to be cleaned. Secondly, the floor in the foyers needs to be better maintained or waxed and buffed more often.

The downstairs office space was impressive, however, comment was made as to the blond office doors upstairs

not looking as good as dark stained doors and they also show scratch marks easier.

The crowded parking condition was also noticeable due to the fact that the parking lot was almost full and yet the building was not fully occupied. I pointed out that this was due to the employee density of Cosmopolitan. Also in regard to this matter, the plans and specifications call for 112 parking spaces and there are only 105 spaces provided.

The reason that I am bringing these things to your attention is twofold. First, I need all the help I can get in selling this loan; and secondly, I feel that prospective tenants might raise these same objections.

Your competition is going to get stiffer than it is now, and if you can make these corrections, I feel that you can meet this competition because you have a good project in a good location.

I will try to get by your office to further discuss these matters within the next few days.

Very truly yours,

/s/ John
John A. Thweatt
Vice President

JAT:dm

Exhibit "F"

FIRST AND MID-SOUTH MORTGAGE COMPANY
Established 1935
P. O. Box 2568
Nashville, Tennessee
615/254-5401

July 8, 1975

Messrs. F. Murray Parker
and James K. Wall
c/o F. Murray Parker Builders, Inc.
Box 766
Brentwood, Tennessee 37027

Re.: Brentwood Plaza Office Building

Gentlemen:

This letter is to confirm my phone conversation with Tom Smith on July 3, 1975, that our attorney will run the title check for the mortgage title policy. In order that this can be done, I have asked that the as built survey be given first priority and that the survey should show the adjoining lot and the additional parking space.

You are also asked to send, for our approval, a copy of the lease or deed to the adjoining land used for parking.

If you need further explanations of these matters, please call.

Yours very truly,

/s/ John A. Thweatt
John A. Thweatt
Vice President

JAT:dm

Exhibit "G"

Nashville Record, Tues., September 23, 1975

NOTICE OF FORECLOSURE

WHEREAS, Impac Limited, Inc., by a Deed of Trust dated May 18, 1973, of record in Book 4710, page 250, Register's Office of Davidson County, Tennessee, conveyed to Pryor York Lillie, Jr., Trustee, the hereinafter described property to secure the payment of a Promissory Note more fully described in said Deed of Trust, which note is presently held and owned by Third National Bank in Nashville; **and**

WHEREAS, demand has been made for the payment of the aforesaid note secured by the above-described Deed of Trust, which note is in default; and

WHEREAS, Third National Bank in Nashville, the owner and holder of said note has demanded that the property be advertised and sold in satisfaction of said indebtedness and the costs of foreclosure, in accordance with the terms of said note and of the Deed of Trust; and

WHEREAS, the undersigned Thomas P. Kanaday, Jr. has been duly appointed as Substitute Trustee in the place and stead of Pryor York Lillie, Jr., Trustee, said appointment being set forth in Book 4952, page 132, Register's Office of Davidson County, Tennessee.

NOW, THEREFORE, notice is hereby given that I, Thomas P. Kanaday, Jr., Substitute Trustee, pursuant to the power, duty and authority vested in and imposed upon me in the above-described Deed of Trust, will on

at 12 o'clock noon, at the south door of the Davidson County, Courthouse, in Nashville, Tennessee, offer for sale to the highest and best bidder for cash and free of the equity of redemption, homestead, dower, and all other exemptions as provided in said Deed of Trust, certain real property situated in Davidson County, Tennessee, described as follows:

Being Lots Nos. 8, 9, and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County, described as follows: Beginning at the southeast corner of Wilson and Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

Being the same property conveyed to Impac Ltd., Inc., by deed from Bob L. Robinson, Trustee, of record in Book 4655, page 318, said Register's Office.

Said sale will be subject to any and all unpaid taxes that may be a lien against the property and subject to any and all other liens, if any, which take priority over

the Deed of Trust upon which this foreclosure sale is had.

THOMAS P. KANADAY, JR.
Substitute Trustee
18th Floor, Third
National Bank Bldg.
Nashville, TN 37219

Ins. Dates: Sept. 23, 30, & Oct. 7, 1975

Ad.No. 381

(Title Omitted in Printing)

SHOW CAUSE ORDER

(Filed September 26, 1975)

Upon petition of Plaintiffs for a restraining order, as set forth in the Complaint filed in this cause, Plaintiffs are granted a restraining order, pending further orders of this Court; and it is

• • •

Defendant, Third National Bank, is ordered to appear before this court on the 14th day of October at 8:30 a.m. and show cause why a temporary injunction should not issue.

This 26th day of September, 1975, at 11:30 a.m.

/s/ Ben H. Cantrell
Chancellor

(Title Omitted in Printing)

ANSWER OF THIRD NATIONAL BANK IN NASHVILLE

(Filed October 7, 1975)

FIRST DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

For answer, Third National Bank in Nashville says:

1. The allegations in pararaph one of the complaint are admitted.

2. The allegations of paragraph two of the complaint are admitted.

3. The first sentence of paragraph three of the complaint is denied; and this defendant would show that Messrs. Wall and Parker (and not First & Mid-South Mortgage Company) directly approached Third National Bank for construction financing. The second sentence of paragraph three of the complaint is denied in that Messrs. Parker and Wall had already obtained from First & Mid-South Mortgage Company a commitment for permanent financing prior to the time that Messrs. Parker and Wall approached Third National Bank for construction financing. The third sentence of paragraph three of the complaint is denied in that the commitment of First & Mid-South Mortgage Company did not constitute "security for the funds extended by Third National Bank". The only security for the loan was a deed of trust upon the real property.

4. This defendant would show the Court that Exhibit A was not appended to the complaint served on it and

that its files do not reflect any document dated January 10, 1973 and, accordingly, this defendant lacks sufficient knowledge or information to either admit or deny the allegations contained in paragraph 4 of the complaint.

5. The allegations of paragraph five of the complaint are admitted, but this defendant would show the Court that it relied on many other factors in making the construction loan to the plaintiffs. Other factors relied upon by this defendant were the credit worthiness of the borrowers, the contemplated feasibility of the project, and the ability of the borrowers to meet the conditions set forth in the commitment of First & Mid-South Mortgage Company.

6. The allegations of the first grammatical paragraph of paragraph six of the complaint are admitted, but this defendant would show the Court that the sole reason for preclosing the permanent loan was to eliminate the expense of additional transfer taxes and title insurance which would otherwise have been borne by the plaintiffs.

Answering the second grammatical paragraph of paragraph six of the complaint, these defendants would show that the terms of the agreement among plaintiffs, Third National Bank and First & Mid-South Mortgage Company speak for themselves. It is denied that said agreement prohibited the plaintiffs from obtaining another first mortgage from other lenders. Specifically, said agreement provides as follows:

> Borrower will not accept a first mortgage loan upon the aforesaid real property from any other lenders before the termination of the commitment by the permanent lenders.

Said commitment by the permanent lenders expired April 30, 1974. Further, this defendant is informed that

First & Mid-South from time to time told plaintiff that they were free to obtain other financing and, accordingly, said restriction was waived.

7. This defendant is informed that the allegations contained in the first two sentences of paragraph seven of the complaint are true except that the commitment to fund in excess of $656,000.00 was based upon meeting certain rental levels which plaintiffs failed to do. This defendant is without knowledge as to the truth of the allegations set forth in the third sentence of paragraph seven of the complaint. The allegations of the fourth and fifth sentences of paragraph seven of the complaint are true.

8. The first sentence of paragraph eight of the complaint is admitted. While this defendant has no knowledge of the remainder of the allegations set forth in the first grammatical paragraph of paragraph eight of the complaint, it is informed and accordingly believes that such allegations are untrue.

Answering the second grammatical paragraph of paragraph eight of the complaint, this defendant is informed and believes that First & Mid-South Mortgage Co. did not add new conditions to its commitment, but would show the Court that plaintiffs had not contemplated the construction of the facility in accordance with the plans and specifications therefor. Among the deficiencies was the failure of plaintiff to provide a sufficient number of parking spaces so as to comply with the plans and specifications. This defendant is without knowledge as to the plaintiffs' ability to purchase adjoining land. However, it is emphatically denied that any portion of the proceeds from the permanent loan were available for the purchase of said land. Specifically, only $656,000.00 of loan proceeds were to be paid from the permanent loan

because plaintiffs had not met the rental requirement necessary to obtain additional funding up to the amount of $800,000.00. In addition, if the plaintiffs had been able to meet rental requirements necessary to receive $800,000.00 in proceeds, $700,000.00 of said sum plus accrued interest and extension fees were to be paid to Third National Bank in payment of the construction loan; $65,000.00 was to be paid to Third National Bank to repay indebtedness incurred in the purchase of the land on which the building was constructed; and $32,557.80 was due and payable to Ray Bell Construction Co., Inc. for the release of its lien filed against the property. Accordingly, no funds were, under any circumstances, available for the purchase of the adjoining real property.

This defendant is informed that the allegations in the third and fourth grammatical paragraphs of paragraph eight of the complaint are untrue.

9. The allegations of paragraph nine of the complaint are specifically denied.

10. Answering paragraph ten of the complaint, this defendant would show the Court that there is due on the loan outstanding to Third National Bank the principal sum of $700,000.00 plus interest at the rate of ten percent (10%) per annum from August 1, 1975, plus an extension fee in the amount of $3,500.00 plus its reasonable attorney fees. This defendant is without knowledge as to the value of the property known as Brentwood Plaza.

11. The allegations of paragraph eleven of the complaint are admitted. However, this defendant would show the Court that in the event that the indebtedness owed to it is paid by plaintiffs prior to 12 o'clock noon, November 7, 1975, no foreclosure sale will be had.

12. This defendant denies the allegations of the first sentence of paragraph twelve of the complaint and would show the Court that the plaintiffs know they they have been in default on the loan since March 14, 1975 by reason of plaintiffs' failure to pay an extension fee from and after that date; that defendants have been in default of the payment of interest from and after August 1, 1975; and that plaintiffs have been in default in the payment of principal from and after September 15, 1975.

Answering the other allegations contained in paragraph twelve of the complaint, this defendant would show the Court that First & Mid-South has failed to honor its commitment because of the failure of the plaintiffs to comply with their obligations thereunder and that this defendant is seeking to foreclose on its security for the sole purpose of effecting the collection of indebtedness due and owing to it.

13. The allegations of paragraph thirteen of the complaint are denied.

14. Allegations not specifically admitted or denied are hereby denied.

Further answering this defendant prays to be dismissed with its reasonable costs in this cause including attorneys fees and expenses as provided in the note and deed of trust executed by the plaintiffs.

/s/ Thos. P. Kanaday, Jr.
Farris, Evans & Warfield
Solicitors for Third National Bank in Nashville
Eighteenth Floor—Third National Bank Building
Nashville, Tennessee 37219

(Title Omitted in Printing)

AFFIDAVIT OF PAUL J. BROWN

(Filed October 14, 1975)

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

The undersigned, PAUL J. BROWN, being duly sworn, deposes and says:

1. I am a Commercial Officer of Third National Bank in Nashville (Third National) and my principal responsibility relates to construction lending on commercial real estate.

2. Since the spring of 1973, I have handled the loan to Impac Limited, Inc. A true copy of the note is appended hereto as Exhibit A. A true copy of the deed of trust is appended hereto as Exhibit B. A true copy of a certain agreement dated May 18, 1973 among Third National Impac Limited, Inc., and First and Mid-South Mortgage Company is appended hereto as Exhibit C.

3. In the making of its loan to plaintiffs, Third National relied upon, among other things, the commitment of First and Mid-South, the deed of trust securing the debt, the anticipated feasibility of the project, and the credit worthiness and integrity of the borrowers.

4. A true copy of the original commitment issued by First and Mid-South is attached hereto as Exhibit D. Said commitment expired April 30, 1974. Another commitment, a true copy of which is attached as Exhibit E, was issued by First and Mid-South on May 30, 1974

and expired on July 31, 1975. To the best of my knowledge, no additional commitments have been made by First and Mid-South to plaintiffs.

5. Third National's original loan for construction financing matured on May 30, 1974. However, upon receipt of an extension fee, Third National extended the loan until December 2, 1974. I am informed and believe that most of the construction of the office building was completed prior to December 2, 1974 but that some substantial finishing work remained at that time. Plaintiffs sought an additional extension of the loan until March 14, 1975 which was granted upon payment of an extension fee. Third National's commitment to carry the loan expired on March 14, 1975. Although Third National agreed to extend the loan until July 31, 1975, plaintiffs failed to pay the agreed upon extension fee. In fact, Third National even agreed, at plaintiffs' request, to accept such fee on a monthly basis. No fee whatsoever was paid to Third National for an extension after March 14, 1975.

6. While Third National had no obligation to carry the loan for plaintiffs after March 14, 1975, it continued to extend the credit until July 31, 1975 with a view toward plaintiffs' meeting the conditions of the First and Mid-South commitment which expired on July 31, 1975. In fact, by letter dated May 16, 1975, I informed plaintiffs of their obligation to give notice to First and Mid-South. A copy of that letter is attached as Exhibit F.

7. In order to protect its own financial interest as well as the financial interest of the plaintiffs, Third National has made substantial efforts to ascertain whether plaintiffs complied with the terms and condtions of the First and Mid-South commitment which is set forth in

Exhibit E. Third National is informed that plaintiffs failed to comply with the following requirements by that commitment:

(a) There is substantial doubt as to whether Third National's deed of trust (see Exhibit B) is a first lien on the property because of the mechanic's lien in the amount of $32,557.80 filed by Ray Bell Construction Company, Inc. which claims that it commenced construction prior to the recording of the deed of trust. (See Item 1 of Commitment).

(b) No survey was furnished by July 31, 1975. (See Item 3 of Commitment).

(c) A certificate of occupancy was not issued by the Metropolitan Department of Codes Administration until September 22, 1975. (See Item 5 of Commitment).

(d) No assignment of rents was executed. (See Item 8 of Commitment).

(e) The improvements were not completed in accordance with the plans and specifications. Specifically, there was a deficiency of eight parking spaces and certain mechanical and other work was not completed in the bathrooms. There were other material deficiencies in construction. (See Item 10 of Commitment).

8. On August 28, 1975 I called a meeting to find out if there was any way whereby plaintiffs could then comply with the conditions of the First and Mid-South commitment as I knew that First and Mid-South had indicated some willingness to reinstate the commitment. Present at the meeting were John Thrweatt (First and Mid-

South), Willie K. Davis (First and Mid-South), James K. Wall, and Thomas Smith (a representative of the plaintiffs). At this meeting Mr. Davis stated and Mr. Wall then acknowledged that First and Mid-South was under no obligation to honor its expired commitment. I asked Mr. Wall if the building was in a condition to be delivered in accordance with the requirements of the commitment. Mr. Wall responded: "You know I can't". I also informed Mr. Wall that without payment of the Third National loan, it had no other alternative than foreclosure. In essence, Mr. Wall stated that he and Mr. Murray Parker had been negligent in handling the project; that they had "drug their feet"; and that Third National had no other course to follow.

9. In an effort to assist plaintiffs, Third National has repeatedly granted them extensions. As a matter of its policy, Third National has attempted to grant plaintiffs every commercially reasonable consideration to avoid foreclosure but plaintiffs' own course of action (or inaction) is the sole cause of the foreclosure.

10. Plaintiffs have been in default in paying the extension fee since March 15, 1975; in default in the payment of interest since August 1, 1975; and in default in the payment of principal since September 15, 1975. A true copy of the letter demanding full payment is attached hereto as Exhibit G.

/s/ Paul J. Brown
Paul J. Brown

I, Paul J. Brown, make oath that I have assisted in the preparation of the foregoing affidavit; that I have read it fully; and that it is true to the best of my knowl-

edge, except as to matters stated on information which matters I believe to be true. Executed October 13, 1975.

/s/ Paul J. Brown
Paul J. Brown

Sworn to and subscribed before me, this October 13, 1975.

/s/ Dorothy E. Owen
(Seal) Notary Public
My Commission Expires February 2, 1977.

:ED OF TRUST NOTE

THIRD NATIONAL BANK - IN NASHVILLE

$ 700,000.00 *Nashville, Tenn.,* May 18, 19 73

On Demand Impac Limited, Inc. *promise to pay to the order of*

THIRD NATIONAL BANK IN NASHVILLE

Seven Hundred Thousand and no/100---------- *DOLLARS*

with interest at 8½ *per cent per annum, for value received.*

This note is secured by deed of Trust of even date herewith on Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of Davidson County, Tennessee.

And it is expressly understood and agreed by all parties hereto that if it is necessary to enforce payment of this note through an attorney or by suit, debtors shall pay reasonable attorney's fees and all costs of collection.

IMPAC LIMITED, INC.

By: F. Murray Parker

James K. Wall

*No.*_____

Exhibit A 42

THIS INSTRUMENT WAS PREPARED BY

Paul Brown

BOOK 4710 PAGE 250

Deed of Trust

Return to:
THIRD NATIONAL BANK

THIRD NATIONAL BANK
201 - 4th Ave., No.
Nashville, Tenn. 37219

FOR AND IN CONSIDERATION of One Dollar to it *paid, the receipt of which is acknowledged, and the other considerations hereinafter mentioned,* Impac Limited, Inc.

has does
~~have~~ *this day bargained and sold, and do hereby*

transfer and convey, to Pryor York Lillie, Jr. *Trustee, and his successors in trust,*

certain property in the State of Tennessee, Davidson *County, described as follows, to-wit:*

Land in Davidson County, Tennessee, being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County described as follows:

Beginning at the southeast corner of Wilson or Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

Being the same property conveyed to Impac Limited, Inc., by deed from Bob L. Robinson, Trustee, as of record in Book _____, Page _____, said Register's Office for Davidson County.

MAY24	MTGTX	*	$700,000.00		
MAY24	STAX		A* 698.00		
MAY24	PRFEE		A* .50		
MAY24	DEED		A* 4.00	*	702.50

TO HAVE AND TO HOLD said property to the said Pryor York Lillie, Jr.

Trustee, and his successor in trust, forever it *covenant that* it is *lawfully seized of the said property, have a good right to convey it, and that the same is unencumbered.*

It *further covenant and bind* its successors ~~heirs~~ *and representatives, to warrant and defend the title to said property to the said* Pryor York Lillie, Jr. *Trustee and his successor in trust, and his assigns, forever, against the lawful claims of all persons.*

But this conveyance is made IN TRUST for the following uses and trusts, and for no other purposes, to-wit:

To secure the payment of a note of even date herewith in the principal sum of Seven Hundred Thousand and no/100 ($700,000.00) Dollars, executed by Impac Limited, Inc., and payable to the order of Third National Bank in Nashville and delivered for the purpose of securing borrowed money. Said note is payable on Demand and bears interest at the rate of 8½% per annum.

As part of the consideration for the execution of this instrument, and of the indebtedness secured hereunder, the undersigned agree to keep all buildings now on, or to be hereafter erected on said property, insured in some reliable fire insurance company, or companies, for the sum of $ ..... , or at least the maximum insurable value, until the indebtedness herein secured is fully paid, and to have the loss, if any, made payable on the policy, or policies, to said trustee for the benefit of the lawful owner or holder of said indebtedness as his interest may appear.

Exhibit B

Undersigned further agree to pay all taxes and assessments thereon, general or special, and to pay them when due, and, upon demand of said trustee or the lawful owner and holder of said indebtedness, to pay, discharge, or remove, any and all liens which may be hereafter placed against said property and which shall adversely affect the lien of this instrument or enforcement of the terms and provisions hereof; to keep the improvements on said property in good repair and preservation, and in case the trustee or his successors or the lawful owner and holder of said indebtedness shall hereafter be required to appear in any court or tribunal to enforce this deed of trust or the terms thereof, or to defend the title to, or possession of, said property, or the lien of this instrument, or appear in any court to prove the above indebtedness, all the costs and expenses of such appearance or proceedings, together with a reasonable attorneys fee, shall be allowed, and if paid by the trustee or the lawful owner and holder of said indebtedness, shall bear 6 percent interest from the date of payment and shall be and become a part of the indebtedness secured hereby.

Now, if the undersigned grantors shall pay said indebtedness, and all installments thereof, when due, according to the terms hereof, or of any note or notes evidencing the same, and pay taxes, keep up repairs, keep said premises insured, and performs the other and foregoing obligations and agreements, then this trust conveyance shall be of no further force or effect. But if grantors fail to pay said indebtedness, or any part or installment thereof, promptly at maturity, or if, failing to pay taxes, keep up repairs, keep said premises insured, or perform said other obligations and agreements as herein provided, grantors fail to reimburse the Trustee or lawful owner and holder of said indebtedness for all sums, with interest, so expended by said Trustee, or lawful owner and holder of said indebtedness, within thirty days from date of such payment, this trust conveyance shall remain in full force and effect, and at the option of the lawful owner and holder of said indebtedness or part or installments thereof then past due and unpaid, all remaining unpaid indebtedness shall become due and payable at once, without notice, and the said trustee, or his successor in trust, is hereby authorized and empowered, upon giving twenty days' notice by three publications in any newspaper, daily or weekly, published in Davidson County, Tennessee, to sell said property at the front door of the Court House in said county to the highest bidder for cash, at public outcry, free from the equity of redemption, homestead, dower and all other exemptions of every kind, which are hereby expressly waived; and the said trustee or his successor in trust, is authorized and empowered to execute and deliver a deed to the purchaser. The creditor may bid at any sale under this trust conveyance. Grantors agree that the trustee may, at any time after default in the payment of any part of said indebtedness, enter and take possession of said property, and shall only account for the net rents actually received by him. Grantors further agree that, in the event the Trustee fails, before selling said property as herein provided, to enter and take possession thereof, the purchaser shall be entitled to immediate possession thereof upon the delivery to him by the trustee of a deed for said property.

In event of the death, absence, inability, or refusal to act of the said trustee at any time when action under the foregoing powers and trust may be required, the owner of the debt herein secured is hereby authorized to name and appoint a successor to execute this trust, and the title herein conveyed to the above named trustee shall be vested in said successor.

In the event of a sale of said property under and by virtue of this trust, the grantors and all persons holding under them shall be and become the tenants at will of the purchaser from and after the execution and delivery of a deed to such purchaser, said tenancy to be determined at the option of said purchaser upon five days written notice.

Upon any sale under this Deed of Trust, the proceeds will be applied by the Trustee:

First:—To pay all the costs and charges of executing this trust, including attorney's fees and the expenses of any litigation which may arise on account of the execution and enforcement of this trust, or in connection therewith as above provided.

Second:—To pay said debt, or any balance thereof then remaining unpaid.

Third:—The residue to be paid to grantors, or their order.

Witness our hand s this 18th day of May, 1973, the corporate party, if any, having caused its name to be signed hereto by its duly authorized officers on said day and date.

IMPAC LIMITED, INC.

By: F. Murray Parker
F. Murray Parker

James K. Wall
James K. Wall

STATE OF TENNESSEE }
COUNTY OF DAVIDSON }

Personally appeared before me, ... a Notary Public in and for said County and State, ...

the within named bargainor....., with whom I am personally acquainted, and who acknowledged that..... executed the within instrument for the purposes therein contained.

Witness my hand and official seal at..... Tennessee, this.....day of....., 19.....

.....Notary Public

Commission expires.....

STATE OF TENNESSEE }
COUNTY OF DAVIDSON }

Before me, Paul J. Brown, a Notary Public of the State and County aforesaid, personally appeared F. Murray Parker and James K. Wall, with whom I am personally acquainted, and who, upon oath, acknowledged themselves to be Secretary-Treasurer & President of the Impac Limited, Inc., the within named bargainor, a corporation, and that they as such Secretary-Treasurer & President, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by themselves as Secretary-Treasurer & President.

Witness my hand and seal, at office in Nashville, Tennessee, this 18th day of May, 1973.

Paul J. Brown
Notary Public

Commission expires 5-5-76

Return to:
THIRD NATIONAL BANK

DEED OF TRUST

FROM
Impac Limited, Inc.

TO
Bryor York Lillie, Jr., Trustee
THIRD NATIONAL BANK IN NASHVILLE

C07919

IDENTIF. REFERENCE

MAY 24 9 32 AM '73

FELIX Z. WILSON III REGISTER
DAVIDSON COUNTY, TENN.

Compliments of
Chicago Title Insurance Company
S. W. Corner Third & Union
Phone 256-2656
NASHVILLE, TENNESSEE 37201

Exhibit C

Agreement (Filed as Exhibit C to Complaint).

Exhibit D

Letter Dated January 30, 1973 (Filed as Exhibit A to Complaint).

Exhibit E

Letter Dated May 30, 1973 (Filed as Exhibit D to Complaint).

Exhibit F

May 16, 1975

Mr. F. Murray Parker
Mr. James K. Wall
P. O. Box 366
Brentwood, Tennessee 37027

Re: Brentwood Plaza Office Building
Brentwood, Tennessee

Gentlemen:

Our records indicate that the permanent commitment on the above captioned project will expire July 31, 1975. Item 11 of said commitment requires 60 days notice be given for funding.

This letter is to remind you of the 60 day requirement and to further inform you that we look forward to its funding so that we may be taken out. Should you have any questions, please do not hesitate to call upon me at any time.

Very truly yours,

Paul J. Brown
Commercial Officer

PJB:cjr

cc: Mr. Bill Davis
First & Mid-South Mortgage Co.

Exhibit G

FARRIS, EVANS & WARFIELD
Eighteenth Floor
Third National Bank Building
Nashville, Tennessee 37219
Telephone (515) 244-5200

September 4, 1975

Impac Limited, Inc.
c/o F. Murray Parker and
James K. Wall
P.O. Box 766
Brentwood, Tennessee 37027

Re: Brentwood Plaza Office Building

Gentlemen:

This firm represents Third National Bank in Nashville which has referred to us for collection your promissory note, dated May 18, 1973, in the original principal amount of $700,000. In addition to the principal indebtedness, there remains due and payable accrued interest from August 1, 1975. Also, an extension fee of $3,500 is owed for extending the maturity of this note to July 31, 1975.

If this note is not paid in full, including interest and extension fees, by September 15, 1975, it will be necessary to commence foreclosure proceedings under the deed of trust of record in Book 4710, page 250, Register's Office of Davidson County, Tennessee.

Yours very truly,

Farris, Evans & Warfield
/s/ TK
Thomas P. Kanaday, Jr.
dc

(Title Omitted in Printing)

AFFIDAVIT OF CHARLES W. COOK, JR.

(Filed October 14, 1975)

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

The undersigned, CHARLES W. COOK, JR., being duly sworn deposes, as follows:

1. I am a Senior Vice President of Third National Bank in Nashville, and am in charge of all real property lending. Paul J. Brown reports to me.

2. On August 7, 1975, while Mr. Brown was out of town, Don Lockmiller, a Third National Bank employee, and I met with James K. Wall and a person whom I believe was Tom Smith, an employee of Mr. Wall. The purpose of the meeting was to consider what could be done, if anything, to get the Brentwood Plaza property in sufficient condition to comply with the First and Mid-South commitment, if it could be extended.

3. At no time during the course of the meeting did either Mr. Wall or Mr. Smith indicate that they had been frustrated by Third National Bank or First and Mid-South Mortgage Company, nor did Mr. Wall or Mr. Smith suggest in any way that First and Mid-South had altered or added to its commitment.

/s/ Charles W. Cook Jr.
Charles W. Cook, Jr.

I, CHARLES W. COOK, JR., make oath that I have read the foregoing affidavit, and that it is true. Executed October 13, 1975.

/s/ Charles W. Cook Jr.
Charles W. Cook, Jr.

Sworn to and subscribed before me, this October 13, 1975.

/s/ Dorothy E. Owen
(Seal) Notary Public
My Commission Expires February 2, 1977.

(Title Omitted in Printing)

AFFIDAVIT

(Filed October 14, 1975)

My name is John A. Thweatt. I am Vice-President of First and Mid-South Mortgage Company, one of the Defendants in this cause. I am thirty-eight (38) years of age, reside at 3600 Hillsboro Road, Nashville, Davidson County, Tennessee, and have been with First and Mid-South Mortgage Company for ten (10) years and have been a Vice-President for five (5) years. I was the main officer at First and Mid-South Mortgage Company involved with securing financing for the Brentwood Plaza Office Building, the real estate improvement involved in this cause.

First and Mid-South Mortgage Company has at all times been ready, willing, and able to honor all previous commitments made to the Plaintiffs at such time as said Plaintiffs met all the terms and conditions spelled out in said commitment. I and the others involved in this transaction have done all we possibly could to get the Plaintiffs to realize the various requirements that had to be met so that the commitment could be honored, but the Plaintiffs have been unable, unwilling, or simply refused to accept the importance of said conditions and have not fulfilled them.

The Plaintiffs first came to me about a loan in late 1972. On January 30, 1973, a commitment for a first mortgage loan of Seven Hundred Thousand and 00/100 ($700,000.00) Dollars for the Brentwood Plaza Office Building was given to the Plaintiffs by First and Mid-South Mortgage Company and accepted by them on April 2, 1973. That commitment expired on April 30, 1974. First and Mid-South Mortgage Company made this commitment at a reduced fee as an accommodation to the Plaintiffs so that the Third National Bank, a Co-Defendant in this cause, would make the Plaintiffs a construction loan. First and Mid-South Mortgage Company was requested to make this "stand-by" commitment to the Plaintiffs, by the Plaintiffs, so that they might get this construction loan from the Third National Bank. This was supposed to be a pre-closed loan for the convenience of the Plaintiffs, but we never saw the Note and Deed of Trust; and they would have been unsatisfactory to us or any other investor. Said Note and Deed of Trust did not embody the terms and conditions spelled out in our commitment of January 30, 1973, but would have been satisfactory for a construction loan. Such items as the interest rate, the monthly payment, and other various terms were not spelled out in said document. The Plaintiffs and the Third National Bank executed a construction loan agreement and we also entered into what is commonly known in the trade as a "buy-sell" agreement saying we would buy the loan when the improvements were completed and all terms and conditions of our commitment were met.

Our commitment of January 30, 1973, expired on April 30, 1974, and as an accommodation to the Plaintiffs, we made them a new commitment dated May 30, 1974. This commitment was for Eight Hundred Thousand and 00/100 ($800,000.00) Dollars with a higher interest rate and a

higher rental requirement to justify the higher loan. This commitment was accepted on May 31, 1974; but as far as I am aware, no new papers were executed with the Third National Bank on this new commitment, the previous commitment having expired. All during the last half of 1974 and first half of 1975, we made many attempts to interest permanent investors in this loan; but because of generally unsatisfactory appearance due to poor upkeep and an over-crowded parking condition, we were unable to get a great deal of response except one investor was fairly interested in it. We passed on to the Plaintiffs some of the comments we received from these permanent investors in the hope that it would instill in the Plaintiffs the desire to bring their project up to an acceptable basis for a permanent investor.

At no time did we require any additional conditions in excess of those conditions expressed as terms and conditions of our May 30, 1974, commitment for Eight Hundred Thousand and 00/100 ($800,000.00) Dollars. We did offer suggestions and called to the attention of the Plaintiffs that they were short eight (8) parking spaces called for on the plans and specifications and indicated that one of the ways of solving such a shortage would be to use some of the property next door, which I understood would be available to them. At no time did I ever indicate that anything further than the terms and conditions of our commitment were required.

Approximately seventy-five (75) days prior to the expiration date of our commitment on July 31, 1975, the Third National Bank gave notice to the Plaintiffs that they should notify us that they intended to use our commitment even though we had not entered into a "buy-sell" with the Third National Bank covering this commitment.

Even in spite of the above warning by the Third National Bank, the Plaintiffs did not give notice of their decision to exercise the "standby" commitment within the time required, sixty (60) days as provided in the commitment.

During the sixty- (60-) day period, Glenn Eubanks, Vice-President and Manager of the Commercial Loan Department, and I met with the Plaintiffs and sent letters confirming our meetings with the Plaintiffs urging them to take certain steps to make the property ready for the closing of a permanent loan.

On June 24, 1975, I sent a letter to the Plaintiffs, a copy of which is attached hereto specifying what was needed to meet the requirements of the commitment of May 30, 1975. Of the ten (10) things specified in said letter, not one single item was supplied before July 31, 1975. There has never been a certification from the architect that the building has been completed in accordance with the plans and specifications. There has never been a certification from the contractor that the building has been completed in accordance with the plans and specifications. There has never been a letter from the mechanical contractor certifying that the equipment was installed according to the plans and specifications nor a letter indicating the type and capacity of the said unit. An as-built survey was finally secured, dated August 11, 1975. Said as-built survey shows the property to be short eight (8) parking spaces, therefore, not in conformity with the plans and specifications. An occupancy permit from the Codes Administration never was supplied by the Plaintiffs, but we did finally get one from the Codes Administration dated September 22, 1974. We have never been supplied with an insurance policy for fire and extended coverage as required. We have never received an attorney's opinion

or legal documents evidencing the applicant's capacity, legal authority, or good standing to execute the loan documents or audited financial statements. We have never received lien waivers from the general contractor and subcontractors. We have never received authorization for an attorney to make a preliminary title check at the Plaintiffs' expense. We never received a breakdown of costs to complete the remaining tenant finishings.

While the commitment itself was for an Eight Hundred Thousand and 00/100 ($800,000.00) Dollar permanent loan from First and Mid-South Mortgage Company if certain rental achievement clauses were met, we were informed that the Plaintiffs failed to meet those requirements, so the total amount to be funded in a permanent loan would have been Six Hundred Fifty-Six Thousand and 00/100 ($656,000.00) Dollars, but since the terms and conditions of the May 30, 1974, commitment were not met, no funds were provided.

Almost none of the provisions of our May 30, 1974, commitment were met. It is true there was a Deed of Trust which was a valid first lien on the property, but the Deed of Trust and Note which it secured were not in conformity with the terms specified in the loan so new legal papers would have had to been drawn and recorded. Because of this requirement, additional fees and expenses would have had to been paid by the Mortgagor or Plaintiffs. Most of the other provisions of the commitment were embodied in my letter of June 24th, except the loan documents certainly did not contain any provisions required by paragraph 9 of said commitment. Paragraph 11 of said commitment was not complied within that sixty (60) days in that notice to fund was not given.

Therefore, it is a fair summation to say that none of the terms and conditions in the May 30, 1974, commit-

ment of First and Mid-South Mortgage Company to the Plaintiffs were met by the Plaintiffs on or before July 31, 1975.

/s/ John A. Thweatt
John A. Thweatt

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

Personally appeared before me, Louise S. Clemons, a Notary Public in and for the State and County aforesaid, John A. Thweatt, who made oath that he had executed the foregoing Affidavit for the purposes therein contained and that said Affidavit is true of his own personal knowledge, except those things stated to be upon information and belief and those he verily believes to be true.

Witness my hand this 14 day of October, 1975, at Nashville, Tennessee.

/s/ Louise S. Clemons
(Seal) Notary Public

My Commission Expires: Feb. 4, 1979.

FIRST AND MID-SOUTH MORTGAGE COMPANY
Established 1935
P. O. Box 2568
Nashville, Tennessee
615/254-5401

June 24, 1975

Messrs. F. Murray Parker
and James K. Wall
c/o F. Murray Parker Builders, Inc.
Box 766
Brentwood, Tennessee 37027

Re: Brentwood Plaza Office Building

Gentlemen:

Per your letter of June 2, 1975, you served notice to First and Mid-South Mortgage Company that you wished to exercise your right under our commitment dated May 30, 1974. In order to determine if all the conditions of our commitment have been met, we are asking that the following information and items be provided First and Mid-South Mortgage Company no later than July 15, 1975.

(1) Certification from the architect that the building has been completed in accordance with the plans and specifications.

(2) Certification from the contractor that the building has been completed in accordance with the plans and specifications.

(3) A letter from the mechanical contractor certifying that the equipment was installed according to the plans and specifications and have the letter indicate the type and capacity of the units.

(4) As built survey which will also indicate the parking area and parking spaces.

(5) Occupancy permit from Codes Administration. A letter from the city showing that the subject is in compliance with zoning regulations.

(6) Fire and extended coverage insurance policies per Item 6 of our commitment.

(7) In accordance with paragraph 7 of our commitment, we require attorney's opinion and legal documents evidencing applicant's capacity, legal authority, good standing and the qualification of signers to execute the loan instruments. This is to include audited financial statements.

(8) Lien waivers from the general contractor and subcontractor.

(9) Written authorization for our attorney to make a preliminary title check at your expense.

(10) Breakdown of cost to complete remaining tenant finish.

Since the required rental achievement has not been attained, the loan will be closed in the amount of $656,000 at 10% interest for a term of 25 years. The prepayment option will be closed for 10 years, and beginning the 11th year, the prepayment penalty will be 5% reducing 1/2% per year for each additional year to a minimum of 1%. Other standard closing requirements will be included.

All other terms and conditions of our commitment must be complied with before closing.

Very truly yours,

/s/ John A. Thweatt
John A. Thweatt
Vice President

JAT:dm

(Title Omitted in Printing)

ORDER

(Filed October 14, 1975)

This cause having come on to be heard upon application of Plaintiffs for a temporary injunction enjoining Defendant, Third National Bank, from foreclosing that property known as Lots Nos. 8, 19 and 10 on the unrecorded Map of South Brentwood in Davidson County, Tennessee, pending further orders of this cou.t and a show cause order requiring Third National Bank to appear and show cause if any it has why said temporary injunction should not be granted.

From all of which it appears to the Court, based upon the pleadings, exhibits filed by Plaintiffs, and extensive argument of counsel, that Plaintiffs have sufficiently shown the existence of issues which should be determined upon a full hearing of this cause and that Plaintiffs would suffer irreparable harm if the foreclosure occurred prior to such full hearing.

It is accordingly ordered, adjudged and decreed that Defendant, Third National Bank, is temporarily enjoined from foreclosing the subject property pending the final hearing of this cause, upon Plaintiffs posting a bond in the amount of Five Thousand and No/100 ($5,000.00) Dollars and upon Plaintiffs paying the two months interest currently in arrears. It is further ordered, adjudged and decreed that Plaintiffs shall pay said interest monthly and the rentals obtained from the leases on said building shall be applied first to said interest. The interest payments shall be made direct to Third National Bank, on

or before the 5th day of each month, a default of which shall automatically dissolve this injunction

/s/ Ben H. Cantrell
Chancellor
Part One, Davidson Chancery

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

SUPPLEMENTAL ANSWER OF THIRD NATIONAL BANK IN NASHVILLE

(Filed October 16, 1975)

The defendant, Third National Bank in Nashville, for its Supplemental Answer, adopts and incorporates by reference all matters contained in its original Answer and as a further defense states as follows:

THIRD DEFENSE

1. That this Court is without jurisdiction to issue a temporary injunction against Third National Bank in Nashville.

2. Further answering, this defendant prays to be dismissed with its reasonable costs in this cause including attorneys fees and expenses as provided in the note and deed of trust executed by the plaintiffs.

Farris, Evans & Warfield

By: /s/ Thos P. Kanaday, Jr.

By: /s/ Stephen W. Ramp

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

MOTION OF THIRD NATIONAL BANK IN NASHVILLE

(Filed October 16, 1975)

Third National Bank moves as follows:

A. To dissolve the temporary injunction heretofore entered in this cause for want of jurisdiction;

B. To grant this defendant a new hearing on the issuance of a temporary injunction.

Farris, Evans & Warfield

By: /s/ Thos. P. Kanaday, Jr.

By: /s/ Stephen W. Ramp

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

ANSWER OF FIRST AND MID-SOUTH MORTGAGE COMPANY

(Filed November 6, 1975)

For answer to the Complaint heretofore filed against the Defendant, First and Mid-South Mortgage Company, (hereinafter called "First and Mid-South"), the Defendant says:

1. The Complaint fails to state a claim against this Defendant upon which relief can be granted.

2. The Defendant has insufficient information or knowledge to admit or deny the allegations of Paragraph (1).

3. The Defendant has insufficient information or knowledge to admit or deny the allegations of Paragraph (2).

4. Defendant, First and Mid-South, denies the allegations of Paragraph (3). Defendant, First and Mid-South, alleges that the Plaintiffs made application to said Defendant on November 30, 1972, for a permanent commitment based on a loan of Seven Hundred Thousand and 00/100 ($700,000.00) Dollars for a twenty-seven- (27-) year term, the loan to become effective upon completion of the building in accordance with the plans and specifications. This financing was not secured: and finally Defendant, First and Mid-South, made a commitment to make a loan of Seven Hundred Thousand and 00/100 ($700,-000.00) Dollars at a rate of nine (9%) percent per annum for a term of twenty-five (25) years, by letter dated January 30, 1973. Defendant, First and Mid-South denies that it sought construction financing from the Third National Bank, denies that it gave the Third National Bank any assurance that it would be "taken out" at the completion of construction, and denies that any assurance was made which would provide security for the funds loaned by the Third National Bank.

5. Defendant, First and Mid-South, denies any agreement of January 10, 1973, of any sort involving Plaintiffs; but if such date is intended to be January 30, 1973, Defendant, First and Mid-South, admits it made a commitment dated January 30, 1973, which Plaintiffs accepted April 2, 1973, containing certain terms and conditions. Defendant, First and Mid-South, denies it made any assurance it would take the Third National Bank out at completion of construction. Defendant, First and Mid-South, only committed to do those things contained in said commitment

if all of the terms and conditions of said commitment were met.

6. Defendant, First and Mid-South, denies the allegations of Paragraph (5).

7. Defendant, First and Mid-South, denies the allegations of the first grammatical paragraph in Paragraph (6). Defendant, First and Mid-South, alleges that a representative of the Third National Bank suggested that it could be a preclosed loan and Defendant, First and Mid-South, had no objection; but Defendant, First and Mid-South, alleges that the Note and Deed of Trust executed by Plaintiffs were wholly and completely unsatisfactory for use in documenting the permanent loan in that said Note and Deed of Trust do not embody many of the terms and conditions of the permanent commitment as contained in the letter of January 30, 1973. Defendant, First and Mid-South, alleges that it would have been impossible for the construction loan as evidenced by the Note and Deed of Trust to be converted into a permanent loan and denies that the Third National Bank could simply sell or assign its loan documents to said Defendant, First and Mid-South. Defendant, First and Mid-South, alleges that it had no involvement in the securing of title insurance and that its attorney did not share in the preparation of said title insurance or the Note and Deed of Trust.

Defendant, First and Mid-South, agrees that it executed with the Third National Bank and the Plaintiffs, a Tri-Party Agreement to purchase said Note and Deed of Trust provided all of the terms and conditions of the commitment of January 30, 1973, were fulfilled. Defendant, First and Mid-South, admits that the Tri-Party Agreement contained a promise by the Plaintiffs that they would not accept a first mortgage loan upon the real

property from any other lender before the termination of the commitment by the permanent lender. Defendant, First and Mid-South, alleges that this Tri-Party Agreement only relates to the commitment of January 30, 1973, and that said commitment expired by its term on April 30, 1974. Defendant, First and Mid-South, alleges that at all times it gave its consent to the Plaintiffs obtaining any other first mortgage loan, both during the time the January 30, 1973, commitment was effective and thereafter, and further alleges that said Tri-Party Agreement only applies to the commitment of January 30, 1973, which had expired.

8. Defendant, First and Mid-South, denies that the commitment of January 30, 1973, was extended. Defendant, First and Mid-South, admits that it issued a new commitment on May 30, 1974. Defendant, First and Mid-South, alleges that no Tri-Party Agreement was executed with the Third National Bank based upon this commitment and further alleges that the previous commitment of January 30, 1973, had expired by its terms. The Defendant, First and Mid-South, alleges that the May 30, 1974, commitment reflected the marketing conditions at that time and called for an increased loan amount of Eight Hundred Thousand and 00/100 ($800,000.00) Dollars based on an increase in the rental achievement provisions. The commitment of May 30, 1974, expired July 31, 1975. Defendant, First and Mid-South, has insufficient information or knowledge to admit or deny the allegations concerning the payment of Forty Thousand and 00/100 ($40,000.00) Dollars for these commitments and extensions but admits that the Plaintiffs have paid to First and Mid-South a total of Nineteen Thousand and 00/100 ($19,000.00) Dollars for two (2) different commitments, the first of which the Plaintiffs let expire. Defendant, First and Mid-South, alleges that said fees for these commitments were sub-

stantially under the going market price for these commitments. Defendant, First and Mid-South, admits that it has not returned any of the Nineteen Thousand and 00/100 ($19,000.00) Dollars paid to it. Defendant, First and Mid-South, has received no interest on any funds.

9. Defendant, First and Mid-South, admits that the last commitment expired July 31, 1975. Defendant, First and Mid-South, admits that it was having difficulty obtaining another investor because of the deficiencies of construction and maintenance but alleges that it was prepared and ready, willing, and able to honor its own commitment. Defendant, First and Mid-South, denies that it was continuously bringing up new complaints and new requirements and denies that any of its suggestions were trite and of no consequence.

Defendant, First and Mid-South, denies that it made any totally new demands as a condition to honoring its commitment of May 30, 1974. Defendant alleges that for many weeks the Plaintiffs had been made aware that they were not in conformity with the plans and specifications previously supplied. One particularly substantial deficit was that there were eight (8) parking spaces less than were shown on the plan. Defendant, First and Mid-South, alleges that it was suggested that one way of solving the shortage in parking spaces, was to secure additional land to put required parking on but denies that any additional obligations were imposed upon the Plaintiffs. Defendant, First and Mid-South, denies that it required the Plaintiffs to obtain the lot adjacent to the existing building for additional parking spaces and denies that the Defendant required a survey showing the adjoining lot and additional parking spaces and alleges that the parking shortage could have been solved by the Plaintiffs in any way they so desired. The Defendants have insufficient information or

knowledge to admit or deny the allegations concerning the Plaintiffs proceeding to attempt to satisfy said requirements by pulling down trees on said lot and grading and filling said lot. Defendant, First and Mid-South, denies that the Plaintiffs were placed in an absolutely impossible position of obtaining a survey to show said adjacent lot as having no encumbrances or encroachments of liens since there was a building on said lot to be torn down and denies that this could be done only after the Plaintiffs exercised their option to purchase and denies that any proceeds from the funding of a permanent loan would have helped them financially to purchase said lot and denies that the Defendant was fully aware of the impossibility of this task.

Defendant, First and Mid-South, denies that the Plaintiffs were placed in an extremely frustrating position of attempting to meet new demands that were impossible to meet and denies they faced new ones every few days and alleges that no new demands were made at all, only the demand that the terms and conditions of the commitment be met. Defendant, First and Mid-South, denies that it was deliberately placing them in a position of making their performance impossible.

Defendant, First and Mid-South, denies that they made any new demands on the Plaintiffs at all, either before or after the request for funding in June of 1975.

10. Defendant, First and Mid-South, denies that it waived any requirements of the May 30, 1974, commitment, denies that said terms and conditions were substantially complied with on July 31, 1975, and denies that the building would have been fully completed but for new demands and hindrances.

11. Defendant, First and Mid-South, has insufficient knowledge or information to either admit or deny the allegations of Paragraph (10).

12. Defendant, First and Mid-South, has admitted that the Third National Bank has run an advertisement to foreclose said property on November 7, 1975, but as the entire record in this cause will show, has been enjoined from doing so.

13. Defendant, First and Mid-South, does not have sufficient information or knowledge to admit or deny the allegations concerning the Plaintiffs being in default on their loan to the Third and denies that Defendant, First and Mid-South, has made any loan to the Plaintiffs. Defendant, First and Mid-South, denies that it was to take out the Third by buying a Note and Deed of Trust executed by the Plaintiffs in May of 1973, and denies that it has wholly and totally failed to honor its commitment to the Third and denies that the Third National Bank has any remedy against the First and Mid-South under its contract and denies that it is simply seeking to foreclose the loan and wipe out any of Plaintiffs' equity. Defendant, First and Mid-South, would allege that said Defendant's obligations under the commitment of May 30, 1975, were totally conditioned upon the Plaintiffs meeting all of the terms and conditions of said commitment which the Plaintiffs have failed to do.

14. Defendant, First and Mid-South, denies that the Third National Bank has any remedy against the First and Mid-South, denies that the Third National Bank does not have a right to pursue a remedy against the Plaintiffs, denies that the Plaintiffs are caught between and at the mercy of the Defendants, and denies that the Plaintiffs were prohibited from seeking other financing under said Agreement.

15. Any allegations not herein specifically denied are hereby generally denied with the same force and effect as if they had been specifically denied.

16. Now having fully answered, Defendant, First and Mid-South, asks to be dismissed with its reasonable cost.

Schulman, McCarley, Hollins & Pride

By: /s/ Lewis D. Pride

Attorneys for Defendant, First and Mid-South Mortgage Company

P.O. Box 2707
Nashville, Tennessee 37219

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

MEMORANDUM

(Filed December 9, 1975)

At a show cause hearing held to determine if the Bank should be enjoined from foreclosure of the property described in the complaint, the Court issued a temporary injunction stopping the sale. The Bank has filed a motion to dissolve the temporary injunction citing USCA §12-91. The parties have extensively briefed the question. Based upon the authorities cited in the briefs, it is the opinion of the Court that this Court lacks jurisdiction to issue the injunction.

Section 91 of 12 USCA reads as follows:

"Transfer by bank and other acts in contemplation of insolvency

All transfers of notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." R.S. §5242.

In the case of *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888), the Supreme Court of the United States said:

> "Although the provision(s) [of Section 91 were] evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> "It is further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true."

The rule announced in the *Mixter* case appears to have survived in an unbroken line of authority to the present time. There are only two exceptions which the Court finds in the briefs submitted by the parties. The first and most significant exception is found in the case of *Southern Alaska Canning Company* v. *Superior Court for King County, et al.*, 222 P. 203 (Wash., 1924). In that case the Bank was foreclosing a chattel mortgage and had issued notice of sale to the sheriff who took the mortgaged property into possession. The mortgagor instituted a proceeding in the Superior Court seeking to have the foreclosure transferred to that court alleging that it did not owe the Bank all of the sum set out in the notices but was entitled to a credit in a large sum. The Court issued a temporary injunction staying the action of the sheriff. This injunction was given without bond. It is true that the Court in that case used the following language:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it."

However, the Court earlier in its opinion had confined its investigation to the question of whether or not the mortgagor must post bond in order to get the foreclosure removed to the Superior Court. The Court said:

> "The sole question before us is, where a mortgagor has instituted proceedings to transfer to the Superior Court a pending foreclosure by notice and sale given by the sheriff, of his chattel mortgage, must he give a bond before the Court will restrain the sheriff from further proceedings?"

So the injunction in that case was not to restrain the Bank from foreclosing but was to restrain the sheriff from proceeding after, under the laws of that state, an action had been instituted to transfer the foreclosure to the Superior Court. The action was not to stop the foreclosure but to transfer it to the court.

The only other exception discovered in the cases is where the property which is the subject of the injunction does not belong to the Bank.

Therefore, it seems to the Court to be clear that the statute above cited removes the jurisdiction of the Courts to grant temporary injunctions prohibiting the foreclosure of property in which the Bank has a security interest. Therefore, the injunction should be dissolved. Mr. Kanaday will prepare the decree.

/s/ Ben H. Cantrell
Chancellor

This December 9, 1975

xc: Ms. Gail Pigg
Mr. Thomas P. Kanaday
Mr. Stephen W. Ramp

(Title Omitted in Printing)

ORDER

(Filed January 8, 1976)

This cause came on to be heard upon motion of Defendant, Third National Bank, to dissolve a temporary injunction against foreclosure of the property described in the complaint, said motion to dissolve being based upon the fact that the court did not have jurisdiction to grant

a temporary injunction against a national bank pursuant to USCA §12-91.

It is the opinion of the court, after reading the statute and the cases cited by counsel, that the statute so cited does remove the jurisdiction of the court to grant temporary injunctions prohibiting the foreclosure of property in which the bank has a security interest.

It is accordingly ordered, adjudged and decreed that the injunction heretofore granted should be dissolved.

However, pursuant to motion of Plaintiff for a discretionary appeal from said order, and said order dissolving an injunction heretofore granted, and it further appearing that the order involves a question of law as to which there is substantial ground for difference of opinion, that question being whether a state court is prohibited by USCA §12-91 from granting a temporary injunction against a national bank when that bank has a security interest in the subject property;

It is accordingly ordered, adjudged and decreed that the Plaintiff is granted an appeal from the above order, to the Supreme Court, upon perfecting said appeal within thirty (30) days from the date of entry of the order.

It is further Ordered, Adjudged and Decreed that the defendant bank is stayed from foreclosure of the subject property until plaintiff is able to perfect the appeal and remove the record to the Supreme Court.

This 8th day of January, 1976.

/s/ Ben H. Cantrell
Chancellor

(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
For Publication
Davidson Equity
Honorable Ben H. Cantrell
Chancellor

IMPAC LIMITED, INC.,
F. MURRAY PARKER and
JAMES K. WALL,
Appellants,

vs.

THIRD NATIONAL BANK and
FIRST AND MID-SOUTH
MORTGAGE COMPANY,
Appellees.

For Appellants:
Gail P. Pigg
Nashville, Tennessee

For Appellees:
Thomas P. Kanaday, Jr.
Nashville, Tennessee
Stephen W. Ramp
Nashville, Tennessee

OPINION

(Filed August 16, 1976)

Reversed and Remanded — Wm. H. D. Fones, J.

OPINION

The question presented by this interlocutory appeal is whether a section of the National Bank Act prohibits a state court from issuing an injunction against a national bank, as mortgagee, temporarily restraining it from foreclosing upon appellant's property.

Appellant brought this action against appellee in the Chancery Court of Davidson County when appellee declared appellant in default on a note secured by a deed of trust on real property and advertised the property for sale, pursuant to terms contained in the deed of trust. Appellant sought to enjoin appellee from proceeding with the foreclosure sale and set forth the grounds upon which it sought the injunction. The Chancellor found, upon the pleadings, exhibits, and arguments of counsel at the show cause hearing, that there existed issues which should be determined upon a full hearing; and that appellants would suffer irreparable harm if the foreclosure sale occurred prior to the hearing. Upon these findings, the Chancellor issued a temporary injunction prohibiting appellee from foreclosing on appellant's property prior to a full hearing on the merits of the cause.

Appellee then moved the Trial Court to dissolve the temporary injunction on the basis that 12 U.S.C.A. §91, denied the Court jurisdiction to issue the injunction. The motion was granted, and the Chancellor allowed appellant a discretionary appeal to this Court.

The statute upon which appellee relies, reads as follows:

> §91. *Transfers by bank and other acts in contemplation of insolvency*
>
> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation

> thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Appellee maintains that this statute, and the case law construing it, prohibits the courts of this State from issuing an interlocutory injunction against a national bank under any circumstances. This view necessarily encompasses the position that regardless of the degree of wrongdoing on the part of a national bank against one of its debtors, resulting in irreparable damage, our courts, both state and federal, are prohibited from exercising jurisdiction and allowing an equitable remedy until a full trial on the merits of the cause has been completed. We cannot accept appellee's position as a correct exposition of the law.

The leading case construing the statute is *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888). There plaintiffs began a suit against the bank in the United States Circuit Court (now District Court) of Massachusetts by writ of attachment for the amounts owed them. At the time the lawsuit was instituted, the bank was solvent; but it later closed, and a receiver was appointed to wind up its affairs. The question before the Court was whether an attachment could issue against a solvent national bank before final judgment in a suit begun in federal court.

The Court noted that although the prohibition against interlocutory injunctions did not expressly apply to federal

courts, those courts were only authorized to issue attachments in common law causes as provided by the applicable state law. The Court held that the power of state courts to issue attachment (and injunctions) prior to final judgment had been eliminated by the federal statute and that the statute was not limited to protecting insolvent banks:

> Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> 124 U.S. at 727.

We are of the opinion that the precedential value of the broad language of the last quoted sentence is limited to the facts of the case in which it was spoken, and that the *ratio decidendi* of *Mixter* does not extend to the facts of the case at bar. We reach this conclusion only after a careful search for subsequent decisions of the United States Supreme Court interpreting 12 U.S.C.A. §91. We are unable to find that the *Mixter* rationale has been applied to the converse situation; that is, a situation in which a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure sale by the bank. *See, Van Reed* v. *People's National Bank of Lebanon*, 198 U.S. 554, 25 S.Ct. 775, 49 L.Ed. 1161 (1905); *Mechanics Universal Joint Company* v. *Culhane*, 299 U.S. 51, 57 S.Ct. 81, 81 L.Ed. 33 (1936). Nor have we found any federal court of appeals or district court decisions which make the *Mixter* decision so applicable.

Although we have read with interest the opinions in other states which hold contra to our decision today, *Free-*

man Mfg. Co. v. *National Bank of Boston*, 160 Mass. 398, 35 N.E. 865 (1894); *Metropolitan Lumber Co.* v. *Fordham Nat. Bank*, 102 N.J.Eq. 514, 141 A. 742 (1928); *First National Bank of Oakland* v. *Superior Court*, 240 Cal.App.2d 109, 49 Cal.Rptr. 358, *cert. denied* 385 U.S. 829 (1966), we are not persuaded by what appears to be blind reliance on *dicta* in the federal cases. Rather, we look to the purpose of the statute which was to secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors and to protect national banks in general. *See, e.g., First National Bank* v. *Colby*, 21 Wall 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court*, 301 P.2d 64 (Cal.App. 1956).

In our opinion, the decision in *Earle* v. *Penn, et al.*, 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900), undermines the literalism accorded by courts of our sister states to the *Mixter* Court's statement that the remedies of attachment, injunction and execution are taken away altogether and cannot be used under any circumstances. A writ of attachment by garnishment was issued and served upon the Chestnut Street National Bank, as garnishee, to reach the assets of one James Long; and upon the answer and interrogatories filed by the bank, judgment was entered against the bank. Shortly thereafter the bank closed, and Earle was appointed receiver. He intervened and moved to vacate the judgment and dismiss the attachment upon the authority of the statute under consideration here. In reviewing the decision of the Supreme Court of Pennsylvania sustaining the attachment and judgment against the bank or garnishee, Mr. Justice Harlan, writing for the court said:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in § 5242,

> 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof.' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of § 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others."
>
> 178 U.S. at 453, 454.

In the instant case, appellee is not using the statute as a shield to protect its assets, but is using it to preclude appellant from protecting its own property. True, appellee has a security interest of $700,000 in the property. However, the property is in the form of an office building allegedly worth in excess of $1,000,000 which cannot be sold, or assigned, or spirited away in the dark of the night so as to defeat appellee's security interest. The Chancellor predicated the temporary injunction (before it was dissolved) upon the condition that appellant continue to pay interest on the $700,000 at the contract rate until a final determination on the merits could be made. In short, appellee's security interest in appellant's property was completely protected.

Without the issuance of the temporary injunction, however, appellant's property would have been sold without equity of redemption; and its only remedy would be to bring an action against the bank for damages. This type of inadequate and incomplete relief at law prompted the fashioning of equitable relief, which appellee says is not available in this situation.

Appellee seeks to rely on the procedure of public foreclosure sale sanctioned by the laws of this State, but maintains that appellant is unable to avail itself of the statutory protection of T.C.A. §§23-2401 *et seq.* We cannot allow appellee to avail itself of the law favorable to it and not be bound by that part which accords relief to appellant, *State* v. *Superior Court*, 128 Wash. 100, 222 P. 203 (1924).

We have determined that the United States District Courts in this State would have no jurisdiction to entertain this action, *Bachman* v. *First Mechanics Nat. Bank of Trenton*, 69 F.Supp. 739 (D.C. N.J. 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F.Supp. 108 (1971), and that our State courts provide the only forum in which appellant may obtain relief.

Reversed and remanded to the Chancery Court of Davidson County for proceedings consistent with this opinion. Costs of this appeal are adjudged against appellee.

/s/ Wm. H. D. Fones
Justice

Concur:

Cooper, C.J.

Harbison, J.

Henry, J., not participating

Brock, J., dissents—see separate opinion

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
For Publication
Davidson Equity
Hon. Ben H. Cantrell,
Chancellor

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,
Appellants,

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,
Appellees.

DISSENTING OPINION

(Filed August 16, 1976)

I respectfully dissent. I do so most reluctantly because the majority opinion has reached a just result. It is my view, however, that the last clause of 12 U.S.C.A., § 91, absolutely forbids the issuance by a state court of a temporary injunction or any similar process against a national bank prior to entry of a final judgment or decree. That clause provides:

> ". . .; and no attachment, injunction, or execution, shall be issued against such (national banking) association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

As acknowledged in the majority opinion, the Supreme Court of the United States has construed this provision to apply not only to insolvent national banks but to sol-

vent ones as well. That Court has said that "The remedy is taken away altogether and cannot be used under any circumstances." *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S. Ct. 718 (1888). The opinion in the *Mixter* case traces the legislative history of § 91 and makes clear that the intent of Congress was to protect all national banks from all pre-judgment injunctions, attachments, etc., issuing from state courts. The distinction made in the majority opinion between state court actions brought by *debtors* of a national bank and those brought by *creditors* of a national bank is, in my opinion, not a valid one because the harm to the national bank defendant is the same whether the injunction is sought by a debtor or by a creditor. See *First National Bank of Oakland* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358 (1966), cert. den. 87 S. Ct. 65 (1966); *Miller* v. *Mercantile National Bank of Hammond*, 234 Ind. 202, 125 N.E.2d 720 (1955); *Kemple* v. *Security First National Bank of Los Angeles*, 249 C.A. 719, 57 Cal. Rptr. 838 (1967); *Freeman Mfg. Co.* v. *National Bank of Republic*, 160 Mass. 398, 35 N.E. 865 (1894). A temporary injunction by a debtor restraining foreclosure of a deed of trust belonging to the bank constitutes interference with the assets of the bank in the same way as does an attachment by a creditor of the same deed of trust. Accordingly, I would hold that the Chancellor was correct.

/s/ Ray L. Brock
Brock, J.

SUPREME COURT, NASHVILLE

Davidson Equity

Reversed and Remanded.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,

Appellants

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,

Appellees

ORDER

(Filed August 16, 1976)

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the decree of the Chancellor be reversed and that the cause be remanded to the Chancery Court of Davidson County for proceedings consistent with the Court's opinion, a certified copy of which will accompany the procedendo on the remand, and for the collection of the costs of the cause below; for all of which, let procedendo issue.

The costs of the appeal will be paid by Third National Bank in Nashville, for which execution may issue if necessary. 8/16/76.

(Brock, J., Dissenting)